Supreme Court, U.S.
FILED
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No. 01-599

In The

Supreme Court of the United States

JANET L. LEE,

Petitioner,

v.

SUN LIFE ASSURANCE COMPANY OF CANADA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petitioner is Janet L. Lee. The respondent is Sun Life Assurance Company of Canada. Sun Life Assurance Company of Canada is wholly owned by Sun Life Financial Services of Canada Inc., a publicly traded company. Mark E. Schmidtke of Hoeppner, Wagner & Evans LLP is the counsel of record for the respondent. Michael Bloom, house counsel, is co-counsel for Sun Life Assurance Company of Canada.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari. The Fifth Circuit's decision to dismiss Petitioner's untimely appeal for lack of jurisdiction under Federal Rule of Civil Procedure 77(d) and Federal Rule of Appellate Procedure 4(a)(6) is not only mandated by those rules, but is also consistent with the uniform practice of the circuit courts. For over fifty years, the federal rules of civil and appellate procedure have incorporated a deadline for filing a notice of appeal where the district court clerk fails to timely notify the parties of the court's final judgment. These rules have placed a burden on the litigants to keep informed of the trial court's proceedings. Petitioner cannot complain that she was not given an opportunity to be heard when she did not even attempt to satisfy this burden. Thus, Petitioner has not asserted a viable constitutional law issue that would merit review by this Court and there is no reason for this Court to review the decision below.

JURISDICTION

This Court has discretionary jurisdiction to review decisions by the federal courts of appeals. 28 U.S.C. § 1254(1). For the reasons set forth herein, Respondent submits that this court should not exercise this jurisdiction.

STATUTES INVOLVED

This case involves Federal Rule of Appellate Procedure 4(a)(6), Federal Rule of Civil Procedure 77(d), and the Fifth Amendment of the United States Constitution.[1]

COUNTERSTATEMENT OF THE CASE

Petitioner filed suit in state court, seeking to overturn a decision by Sun Life Assurance Company of Canada ("Sun Life") to deny Petitioner's claim for benefits under an employee disability benefit plan. Sun Life removed the matter to the United States District Court for the Middle District of Louisiana based on original jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) because the matter involved a claim for benefits under a disability policy governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*[2] Jurisdiction was also based on 28 U.S.C. § 1332 because the case involved citizens of different states and the matter in controversy exceeded the sum of $75,000 exclusive of interests and costs.

On April 11, 2000, Sun Life filed a motion for summary judgment. Petitioner filed a cross-motion for summary judgment. On June 28, 2000, the District Court

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[1] The text of Civil Rule 77(d), Appellate Rule 4(a)(6), and the pertinent Advisory Committee Notes are included in the Opposition Appendix ("Opp. App.") beginning at Opp. App. 1.

[2] Petitioner erroneously refers to the federal statute as "URESA."

entered Judgment denying Petitioner's motion and granting Sun Life's motion. Petitioner never checked the status of the summary judgment motions. [Petition for Writ of Certiorari, p. 3.]

Petitioner did not receive notice of the District Court's entry of Judgment until April 2, 2001. On April 3, 2001, more than 9 months after the District Court entered Judgment, Petitioner filed a notice of appeal. Sun Life filed a Motion to Dismiss the appeal as untimely under Civil Rule 77(d) and Appellate Rule 4(a)(6). Specifically, Sun Life argued that because Petitioner's notice of appeal was filed after expiration of the 180-day time period in Appellate Rule 4(a)(6), her appeal was barred. On May 31, 2001, the United States Court of Appeals for the Fifth Circuit dismissed the appeal.

REASONS FOR DENYING THE WRIT

A. Petitioner Has Failed to Offer This Court A Compelling Reason That Would Warrant Granting the Writ under Supreme Court Rule 10.

Petitioner has not established any of the bases for granting a writ as specified in Supreme Court Rule 10. Petitioner has failed to demonstrate any discord among the federal circuit courts of appeals. In fact, the circuit courts have uniformly enforced the time deadlines

incorporated in the federal rules for filing appeals.[3] Petitioner also has not established a conflict between the decision of the Fifth Circuit in this case and a prior decision of this Court. The cases cited by Petitioner addressing Fifth Amendment issues do not even come close to addressing the constitutionality of the time deadlines in the federal rules.[4] Thus, Petitioner has failed to

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[3] *See, e.g., Perfetto v. Kuhlmann*, 1998 U.S. App. Lexis 15307 (2d Cir. 1998); *Marcangelo v. Boardwalk Regency*, 47 F.3d 88 (3d Cir. 1995); *Latham v. Wells Fargo Bank*, 987 F.2d 1199 (5th Cir. 1993); *United States of America v. Personal Property Seized From D.C. Cycle Shop*, 2000 U.S. App. Lexis (6th Cir. 2000); *Luckett v. Rent-A-Center*, 53 F.3d 87 (7th Cir. 1995); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994); *Mitchell v. Burt Vetterlein & Bushnell PC*, 197 F.3d 421 (9th Cir. 1999); *Sevants of the Paraclete v. Doe*, 204 F.3d 1005 (10th Cir. 2000); *Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001).

[4] *Bloom v. Illinois*, 391 U.S. 194 (1968) (holding that prosecutions for serious criminal contempt are subject to the jury trial provisions of the Constitution); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (holding that a civilian's exclusion from the Naval Gun Factory in Washington, D.C. without being advised of the grounds for exclusion or hearing did not violate due process); *Galvan v. Press*, 347 U.S. 522 (1954) (holding that a classification by Congress, which provided for the deportation of any alien who was a member of the Communist Party, did not violate due process); *Lambert v. California*, 355 U.S. 225 (1957) (holding that a felon in California who did not know of the duty to register with the police department may not be convicted consistently with due process); *Lynch v. United States*, 292 U.S. 571(1934) (holding that the district court did not lack jurisdiction after the enactment of the Economy Act, and that Congress did not withdraw the plaintiff's right to sue the government); *Matthew v. Eldridge*, 424 U.S. 319 (1976) (holding that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due

establish any basis for granting a writ of certiorari in this case.

B. For over Fifty Years, the Federal Rules Have Incorporated a Time Limit on the Filing of an Appeal where the District Court Clerk Fails to Notify the Parties of a Final Judgment.

Petitioner fails to acknowledge that Civil Rule 77(d) and Appellate Rule 4(a)(6) specifically work in tandem to enlarge a party's right to appeal when the clerk fails to provide notice of an entry of judgment. Before the 1991

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process); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (holding that the Fifth Amendment prohibits federal government from seizing real property in a civil forfeiture proceeding without a prior notice and hearing); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that the Minimum Wages For Women Act was constitutional and did not violate the due process clause of the Fourteenth Amendment). The appellate court cases cited by the Petitioner also do not address the issue in this case. *Kaczmarczyk v. I.N.S.*, 933 F.2d 588 (7th Cir. 1991) (holding that Polish citizens who sought political asylum had a constitutional right to rebut official and/or judicial notice taken by the appellate board through motions to reopen, but their failure to file such motions waived their individual rights to rebuttal); *Knoetze v. United States*, 634 F.2d 207 (5th Cir. 1981) (holding that revocation of an alien's visa, without notice, did not jeopardize a liberty or property interest entitled to constitutional protection); *Potter v. Castle Construction Co.*, 355 F.2d 212 (5th Cir. 1966) (holding that in a National Labor Relations Act case the appellee could have interevened at any stage of the proceeding and had waived any complaint); *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991) (holding that a city's policy with respect to the towing and destruction of supposed "junk" vehicles that are registered or licensed violated due process).

amendments to both rules, an individual's right to appeal was viewed as lost even if the clerk's failure to provide notice of an entry of judgment or order was the sole cause of a party's untimely appeal.

Civil Rule 77(d) requires a district court clerk to notify parties of the entry of final judgment. Prior to 1946, this rule contained no provision stating what would happen to the appeal period if the clerk failed to issue notice. In an effort to fill this gap, in *Hill v. Hawes*, 320 U.S. 520 (1944), this Court held that a district court had discretionary authority to vacate a judgment and reenter it for the purpose of reviving a party's right to appeal when the clerk failed to give notice of the original judgment.

After *Hill*, in an effort to establish finality of district court judgments, Civil Rule 77(d) was amended in 1946 to provide that a clerk's failure to notify the parties of final judgment did *not* extend the appeal period or otherwise authorize a district court to vacate and reenter its judgment. [Advisory Committee Notes to the 1946 Amendment to Fed. R. Civ. Proc. 77(d).] The amendment made it clear that notification by the clerk was "merely for the convenience of litigants." [Advisory Committee Notes to the 1946 Amendment to Fed. R. Civ. Proc. 77(d).] The 1946 amendment to Civil Rule 77(d) resulted in the loss of a litigant's opportunity to appeal when the clerk failed to provide notice of the entry of judgment. *See, e.g., Wilson v. Atwood*, 725 F.2d 255 (5th Cir 1984); *Case v. BASF Wyandotte*, 737 F.2d 1034 (Fed. Cir. 1984).

In 1991, Civil Rule 77(d) and Appellate Rule 4(a) were amended to ease the sanctions imposed on litigants who were barred from filing appeals because of the

clerk's failure to provide notice of entry of judgment. [Advisory Committee Notes to the 1991 Amendment to Fed. R. Civ. Proc. 77(d) and Fed. R. App. Proc. 4(a).] Civil Rule 77(d) now states that lack of notice by the clerk does not relieve a party from filing a timely appeal *"except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."* [Fed. R. Civ. Proc. 77(d).] Appellate Rule 4(a)(6), as amended, allows the district court to reopen the time to file an appeal only when:

> (1) *The motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of entry, whichever is earlier;*
>
> (2) The court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (3) The court finds that no party would be prejudiced.

[Fed. R. App. Proc. 4(a)(6).]

The 1991 amendment to Appellate Rule 4(a) was viewed as imposing an "outer time limit" of 180 days for a party to seek leave to file a late appeal where that party failed to receive notice of entry of judgment. [Advisory Committee Notes to the 1991 Amendment to Fed. R. App. Proc. 4(a).] The time restrictions in Appellate Rule 4(a)(6) strike a perfect balance between the duty of the clerk to give notice of entry of judgment and a party's duty to maintain contact with the court while her case is pending. [Advisory Committee Notes to the 1991 Amendment to Fed. R. Civ. Proc. 77(d) and Fed. R. App. Proc. 4(a)(6).]

The rule also serves a dual purpose in protecting the interests of obtaining final judgments and preserving a litigant's right to appeal when notice of order or judgment is not provided by the clerk. [*Id.*]

In the present case, Petitioner did not check with the district court to determine the status of the cross-motions for summary judgment. Instead, Petitioner let her 180-day opportunity to appeal pass without any action on her part until after the regulatory time period expired. Under Appellate Rule 4(a)(6), the 180-day period from the entry of judgment serves as the "outer time limit" in which a party can attempt to reopen her appeal. [Advisory Committee Notes, 1991 Amendment to Fed. R. App. Proc. 4(a)(6).]

The very rule which the Petitioner claims violates her right to due process originated with this Court. [Amendments to Federal Rules of Civil Procedure: Supreme Court of the United States, 134 F.R.D at 525-526, 697-699 (April 30, 1991); Amendments to Federal Rules of Appellate Procedure: Supreme Court of the United States, 134 F.R.D. at 725-726, 727 (April 30, 1991).] To allow Petitioner in this instance the right to file an untimely appeal not only abrogates the clear provisions of Civil Rule 77(d) and Appellate Rule 4(a)(6), but also destroys the purpose of the rules in placing a duty on the parties to stay in contact with the court while their case is pending.

C. The Fifth Amendment Of The United States Constitution Is Not Violated When A Party Loses A Procedural Right To Appeal Due To Her Own Neglect.

Petitioner claims that her right to appeal should not be forfeited under Appellate Rule 4(a)(6) when notice of the trial court's judgment was not received until after expiration of the 180-day deadline prescribed by the rule. [Petitioner's Petition for Writ of Certiorari, p. 8.] Petitioner believes that the bar of her appeal, under these facts, violates due process. The fundamental problem with Petitioner's argument is that it ignores the fact that she did not lose her right to appeal by operation of Appellate Rule 4(a)(6), but by her own failure to contact the clerk in a timely manner to determine the status of the summary judgment ruling.

A party is not denied due process when her appeal is untimely due to her own neglect. In *Wainwright v. Torna*, 455 U.S. 586 (1982), the issue was whether a criminal defense counsel's failure to seek discretionary review by a state supreme court constituted ineffective assistance of counsel. This Court held that it did not. *Id.* at 588. In a footnote, this Court also held that an untimely request for review did not constitute a due process violation:

> Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation – if even implicating a due process interest – was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application fo review that was not filed timely

> did not deprive respondent of due process of law.

Id. at 588, n. 4. Likewise, the untimeliness of the appeal in this case was caused by counsel, not by Appellate Rule 4(a)(6).

A similar result was reached in *Mitchell v. Burt Vetterlein & Bushnell PC*, 197 F.3d 421 (9th Cir. 1999), which involved a due process challenge to Appellate Rule 4(a)(6). The parties asserted that they had not received notice from the district court clerk of the entry of judgment on October 1, 1997. The parties claimed that on April 9 and 10 of the following year, they discovered orders denying their post-trial motions. The parties then filed motions to obtain relief from their failure to file their appeals in a timely fashion. The Ninth Circuit held that the plain language of both Appellate Rule 4(a)(6) and Civil Rule 77(d) specifically deal with the problem of lack of notice of a final judgment. 197 F.3d at 425. The court further held that because the language in Appellate Rule 4(a)(6) delineates a specific period during which the period of appeal may be reopened, the district courts no longer have the discretion to grant motions to reopen the period for appeal that are filed outside that specific period, *"even if the appellant does not receive notice until that period has expired."* *Id.* at 425 (emphasis added). The court further stated:

> The 180 day period 'establishes an outer time limit for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal'. . . . Taken together, Rule 77 (d) and the changes to Rule 4(a) set *an outer* limit on the time a party can wait, but is it *the outer* limit?

> The answer is yes. The very structure of the changes make it clear that parties are expected to energize themselves, and to discover the entry, with or without notice. Failing that, they lose the right to appeal.

[*Id.* (emphasis in original).]

The Ninth Circuit also rejected the appellant's argument that the federal rules somehow violate due process under the Fifth Amendment. *Id.* at 426. The court held that where a procedural right to appeal is limited in time, "the onus is upon the party to determine when that time commences to run" and that any loss of rights was due to the actions of the party and not a result of the operation of the federal rules. *Id.* at n. 11.

In summary, Petitioner had an opportunity to file her appeal to the Fifth Circuit. However, in order to establish finality of judgment, this opportunity was limited in time pursuant to Appellate Rule 4(a)(6) and Civil Rule 77(d). The loss of the Petitioner's right to appeal was due to her own inaction in failing to determine the appropriate time in which to seek the protection of Appellate Rule 4(a)(6) and was not due to the federal rules.

CONCLUSION

For the foregoing reasons, Petitioner has failed to satisfy any ground for a writ of certiorari and the petition should therefore be denied.

Respectfully submitted,

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APPENDIX

Fed. R. Civ. Proc. 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

ADVISORY COMMITTEE NOTES

1946 Amendment

Note. Rule 77(d) has been amended to avoid such situations as the one arising in *Hill v. Hawes*, 1944, 64 S.Ct. 334, 320 U.S. 520, 88 L.Ed. 283. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgement for defendant as required by Rule 77(d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then re-entered it, whereupon

notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although Rule 77(d) did not purport to attach any consequences to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6(c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in *Hill v. Hawes* is to give the district court power, in its discretion and without the limit, and long after the term may have expired, to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6(c) and Note; proposed Rule 60(b) and Note; and proposed Rule 73(a) and Note.

Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for

appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal.

1991 Amendment

This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. [Citations omitted.]

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerk's offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerk's offices, for the duty of that office to give notice of entry of judgment must be maintained.

Fed. R. App. Proc. 4(a)(6)

(a) Appeal in a Civil Case

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

ADVISORY COMMITTEE NOTES

1991 Amendment

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudiced" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enable any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed.R.Civ.P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a

judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.